

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)	
)	SPB Case No. 27425
ROBERT DEFORD)	
)	BOARD DECISION
From medical demotion from the)	(Precedential)
position of Correctional Officer)	
to Office Assistant (General) at)	NO. 92-05
the California Correctional)	
Institution, Department of)	February 4, 1992
Corrections at Tehachapi)	

Appearances: California Correctional Peace Officers Association by Christine Albertine, Legal Counsel, representing appellant, Robert DeFord; Lt. Charles Boxwell, Employee Relations Officer, representing respondent, Department of Corrections.

Before Chavez, President; Stoner, Vice-President; Burgener, Carpenter and Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the proposed decision of the Administrative Law Judge (ALJ) in an appeal by Robert DeFord (appellant or DeFord) from a constructive medical demotion to the position of Office Assistant [General] at the California Correctional Institution, Department of Corrections (respondent or Department). In sustaining the Department's refusal to reinstate DeFord unconditionally to his prior position as a Correctional Officer, the ALJ rejected DeFord's argument that his demotion to the position of Office Assistant was not a true voluntary demotion but was rather in the nature of a medical demotion or temporary assignment of an injured employee, and therefore afforded him mandatory reinstatement rights.

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The Board determined to decide the case itself based upon the record and additional arguments to be submitted in writing and orally. After review of the entire record, including the transcripts and briefs submitted by the parties, and having listened to the oral arguments presented, the Board reverses the ALJ and finds DeFord entitled to mandatory reinstatement, for the reasons expressed below.

FACTUAL SUMMARY

Appellant was appointed a Correctional Officer on July 14, 1985. On May 14, 1989, following an incident on the job, appellant was placed on mandatory sick leave. Appellant's physicians and respondent's physicians agreed that appellant was unable to perform the duties of a Correctional Officer. He was to remain at home on sick leave pending a medical examination and was not to return to work until he was medically cleared.

On June 23, 1989, appellant was cleared by his doctor to return to work in a clerical capacity. Appellant requested that respondent allow him to work in a clerical position, but his request was initially denied.

During August of 1989, appellant's sick leave, holiday and vacation credits were depleted. Appellant contacted Associate Warden Carol Roddy (Roddy) and informed her that he had depleted his leave and was the sole support for his family. She stated she

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would try to find something for him and that when he was better he could reinstate as a Correctional Officer.

Roddy ultimately offered appellant the position of Office Assistant. Appellant felt, based on his medical condition and financial condition, he had no choice but to take the position offered. On August 28, 1989, Roddy instructed appellant to write down that he was voluntarily demoting due to his medical condition.

He wrote:

I, Robert A. DeFord, voluntarily demote to Office Assistant due to medical reasons.

Roddy wrote, on the same document:

I understand that if my medical condition changes, that I retain my civil service status rights due to my previous status as a Correctional Officer.

Appellant believed, based upon Roddy's representations, that if he accepted the position of Office Assistant, he would be reinstated as a Correctional Officer when his medical condition cleared. He was never informed that in order to be reinstated as a Correctional Officer he would have to pass an additional physical, go through another background investigation, and attend the Academy again. Appellant anticipated being in the Office Assistant position for four (4) months.

On October 5, 1989, appellant's physician cleared him to return to his duties as a Correctional Officer. On December 31, 1990 he was cleared to return to work by the doctor at the

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institution. He requested reinstatement to his position as Correctional Officer by letter to Warden Bunnell on January 23, 1991.

Warden Bunnell approved appellant's reinstatement to the position of Correctional Officer on or about February 7, 1991. The offer of reinstatement was conditioned, however, upon appellant's meeting the Department's requirements for permissive reinstatement.

These requirements provide for an updated background investigation and a Phase II medical examination (physical agility test) within 90 days of appointment to the peace officer position.¹ Appellant took the position that his reinstatement was mandatory and that he need not comply with the conditions imposed by the Department. Appellant appealed the Department's refusal to reinstate him unconditionally.

ISSUE

Whether appellant's demotion into the position of Office Assistant should be treated as a voluntary demotion, in which case he would be accorded permissive reinstatement rights only, or as an involuntary medical demotion or temporary assignment of an injured employee, either of which designation would accord him mandatory reinstatement rights?

¹The Department's requirements for permissive reinstatement are contained in the Department's Operations Manual, Section 31060.10.2, which section was entered into evidence at the hearing.

DISCUSSION

We find that appellant's demotion was not a "voluntary demotion" as that term is commonly understood for purposes of determining rights and obligations under the civil service laws. Preliminarily, we note that since appellant had been deemed unfit to perform the duties of a Correctional Officer, his giving up of that position was not voluntary. In addition, we find that appellant believed that in accepting the demotion for medical reasons, he would not be relinquishing any of the civil service rights that accrued to him by virtue of his having held the position of Correctional Officer. He was not informed that any reinstatement would be characterized as permissive only.

Furthermore, demotions for medical reasons typically fall within the purview of either Government Code section 19253.5 (medical demotion) or Government Code section 19050.8 (temporary assignment of an injured employee). Both statutes delineate the rights and obligations of the employer and employee under circumstances where the employee's medical condition precludes him or her from performing the work of his or her position.² Both statutes provide for specified mandatory reinstatement rights upon resolution of the medical condition precipitating the demotion or

²See also Title 2 California Code of Regulations (herein SPB Rules), section 443, which implements that portion of Government Code section 19050.8 pertaining to temporary assignments for injured employees.

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transfer.³ Had appellant come into the correctional institution in August 1989 and demanded to work as a Correctional Officer, when he was medically unfit to perform the duties of that position, the Department would have been compelled to take action under one of these statutes based on appellant's medical condition.

Government Code section 19253.5 provides, in pertinent part:

...(c) When the appointing power, after considering the conclusions of the medical examination and other pertinent information concludes that the employee is unable to perform the work of his or her present position, but is able to perform the work of another position including one of less than full time, the appointing power may demote or transfer the employee to such a position....

(e) The appointing power may demote, transfer or terminate an employee under this section without requiring the employee to submit to a medical examination, when the appointing power relies upon a written statement submitted to the appointing power by the employee as to the employee's condition or upon medical reports submitted to the appointing power by the employee.

(f) The employee shall be given written notice of any demotion, transfer, or termination under this section at least 15 days prior to the effective date thereof. No later than 15 days after service of the notice, the employee may appeal the action of the appointing power to

³It should be noted, however, that while the employee demoted under Government Code 19050.8 has an "absolute right to return to his or her former position", the employee demoted under 19253.5 has a more limited right to return to "an appropriate vacant position in the same class, in a comparable class or in a lower related class." [See Government Code section 19253.5(h)]. In the instant case, the Department did not contest appellant's right to return to his former position, but asserted that the reinstatement was permissive and was therefore subject to Department guidelines applicable to permissive reinstatements.

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the board. The board, in accordance with its rules, shall hold a hearing. The board may sustain, disapprove, or modify the demotion, transfer, or termination.

(g) Whenever the board revokes or modifies a demotion, transfer, or termination, the board shall direct the payment of salary to the employee calculated on the same basis and using the same standards as provided in Section 19584.

(h) Upon the request of an appointing authority or the petition of the employee who was terminated, demoted, or transferred in accordance with this section, the employee shall be reinstated to an appropriate vacant position in the same class, in a comparable class or in a lower related class if it is determined by the board that the employee is no longer incapacitated for duty...(emphasis added)

Had the Department formally invoked Government Code section 19253.5, DeFord would have been entitled to notice and an opportunity to be heard on the propriety of the medical demotion and, if the demotion was sustained, would have been entitled to mandatory reinstatement once his medical condition had resolved itself. Since appellant consented to a demotion, the Department was not compelled to rely on section 19253.5. Nevertheless, the demotion of DeFord for medical reasons comports with the purpose of section 19253.5, and may therefore be construed a "constructive medical demotion" for purposes of determining appellant's current status.

Alternatively, DeFord's acceptance of the clerical position may be construed as voluntary consent to a temporary assignment

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pursuant to Government Code section 19050.8 which provides,
in pertinent part:

19050.8. The board may prescribe rules governing the temporary assignment...within an agency...for not to exceed two years...

(c) To facilitate the return of injured employees to work...

...An employee participating in that arrangement shall have the absolute right to return to his or her former position...(emphasis added).

SPB Rule 443, prescribed by the Board pursuant to Government Code section 19050.8 provides, in part, that:

443. Temporary Assignments for Injured Employees.

...(b) For the purpose of Government Code Section 19050.8(c) an "injured" employee is any permanent or probationary employee or Career Executive Assignment employee who previously had permanent status with a medically verified disability, injury, or illness, whether job or non-job related, that requires the employee to be reassigned to duties outside his/her current classification in order to remain productive.

(c) Eligibility for temporary assignments shall be limited to injured employees who, based on medical opinion, are unable to perform the essential duties of their current classification.

(d) When the employee and appointing power agree, an injured and eligible employee, including a career executive, may be placed in a temporarily modified work assignment involving duties not within the employee's current class for up to two years provided that:

(2) The assignments may involve the duties of a class that has a demotional relationship to the employee's appointment class only to the extent that such a demotional assignment is required in order to provide a productive work

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assignment that is within the employee's capability...

(f) Either the employee or the appointing power may terminate the temporary assignment at any time for any reason...

Since at the time appellant sought to return to the institution, appellant's physician had determined that appellant's medical condition limited him to clerical work, a temporary assignment to a clerical position pursuant to section 19050.8 would have been appropriate.

CONCLUSION

In summary, by placing appellant in the clerical position of Office Assistant, after receiving medical verification that appellant was medically able to perform in a clerical capacity, the Department effected either a "constructive medical demotion" under Government Code section 19253.5 or a "constructive temporary assignment under Government Code section 19050.8." Under either theory, appellant would be entitled to mandatory reinstatement upon resolution of his medical condition. The fact that appellant chose to cooperate with the Department in accepting an assignment to the position of Office Assistant, rather than compel the Department to take action under the above-referenced statutes, should not prejudice appellant in his reinstatement rights.

We therefore find that the Department's conditioning appellant's reinstatement based on its characterization of those

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reinstatement rights as "permissive" was improper. Appellant has mandatory reinstatement rights. The Department shall reinstate DeFord to his former position of Correctional Officer with all back pay and benefits that would have accrued to him had he been mandatorily reinstated on February 8, 1991. [See Government Code sections 19050.8, 19253.5(g)(h); 19584].

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code sections 19050.8, 19253.5 and 19584, it is hereby ordered that:

1. The Department of Corrections and its representatives shall reinstate appellant Robert DeFord to his former position of Correctional Officer and shall pay to him all back pay and benefits that would have accrued to him had he been reinstated on February 8, 1991.

2. This matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

3. This decision is certified for publication as a Precedential Decision (Government Code section 19582.5).

STATE PERSONNEL BOARD

Richard Chavez, President

Alice Stoner, Vice-President

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Clair Burgener, Member
Lorrie Ward, Member
Richard Carpenter, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 4, 1992.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board